Intergraph Cadworx & Analysis Solutions, Inc v EDS Asia Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-673–05 OF 2012
NALLINI PATHMANATHAN J
4 SEPTEMBER 2012

Civil Procedure — Jurisdiction — Forum conveniens — Company incorporated in Texas, USA — Non-exclusive network partner incorporated in Malaysia — Claim for sum due and owing — Application to strike out claim — Whether agreement should be interpreted and construed in Texan law — Place of execution or performance — Whether any legal action should be brought in Texan Courts — Whether Texan Courts have exclusive jurisdiction

The plaintiff, a company incorporated in Texas, the United States of America entered into a COADE Global Network Partner (Independent Representative Agreement) 2009 for the supply of software products and the defendant, a company incorporated in Malaysia, was appointed as the non-exclusive network partner to market and solicit orders for software products of which the plaintiff was the owner or licensee. The plaintiff's claim in this suit was for the sum of USD302,135.08 being the amount due and owing for license fees for the software products sold and delivered to the defendant. The defendant sought to have the plaintiff's claim struck based on cl 10(c) of the agreement which laid out in extensors that: by way of summary, the agreement should be interpreted and construed in Texan law regardless of the place of its execution or performance; for the benefit of the plaintiff, the defendant irrevocably agreed that any legal action should be brought in the Texan Courts; by the execution and delivery of the agreement, the defendant irrevocably consented and submitted to the exclusive jurisdiction of the Texan Courts; the defendant irrevocably waived any objection it had or might have to the laying of venue for any action in the courts of the state of Texas; and that the defendant irrevocably waived any claim that such an action brought in such a court had been brought in an inconvenient forum. The defendant further contended that the plaintiff had disclosed or shown no 'exceptional' circumstances in the current case warranting or justifying this court overriding the clear intention of the parties as expressed in cl 10(c). It was proposed that the matter be heard at first instance in the Texan Courts and then if judgment was obtained for the plaintiff to institute a fresh action in this jurisdiction and obtain judgment by way of summary judgment to uphold the decision of the Texan Courts. The plaintiff strongly opposed the present application.

Held, allowing the claim:

(1) A reading of cl 10(c) stipulated that the law governing the adjudication of

the dispute was to be American law, more specifically Texan law. Therefore wherever the claim was adjudicated upon, the relevant applicable governing law would be that of Texas. The rest of cl 10(c) provided that in the event and for the benefit of the plaintiff, the defendant waived irrevocably any arguments or objections it might take in respect of the forum or jurisdiction of the Texan Courts such that the plaintiff's claim may be brought in such courts without any further dispute or objection from the defendant (see para 9(a)(b)).

(2) The second part of cl 10(c) appeared to provide or accord the plaintiff the benefit of deciding to bring its claim in the Texas Courts whereupon the parties have agreed that there would be no objection from the defendant. But it cannot be concluded with certainty that the clause also stipulated that the parties have agreed irrevocably to confine themselves to the jurisdiction of the Texan courts. In these circumstances, the correct construction to be accorded to cl 10(c) was to accept that the relevant governing law for the dispute was Texan law, but that the issue of the forum was one that was not conclusively decided (see para 9(b)).

(3) The plaintiff had discharged the burden of showing special circumstances warranting the bringing of an action in this jurisdiction, notwithstanding cl 10(c). The special circumstances were the lack of recognition under REJA and the inconvenience and costs of initiating an action in Texas on the relatively straightforward facts of this case for monies due and owing for the supply of software and licenses (see para 9(c)).

[Bahasa Malaysia summary

Plaintif, sebuah syarikat yang diperbadankan di Texas, Amerika Syarikat telah memasuki COADE Global Network Partner (Independent Representative Agreement) 2009 bagi pembekalan produk-produk perisian dan defendan, sebuah syarikat yang diperbadankan di Malaysia, telah dilantik sebagai rakan kongsi rangkaian tidak eksklusif untuk memasarkan dan mengambil tempahan produk-produk perisian yang mana plaintif merupakan pemilik atau pemegang lesen. Tuntutan plaintif dalam guaman ini adalah bagi jumlah USD302,135.08 iaitu amaun yang perlu dibayar dan terhutang bagi bayaran lesen produk-produk perisian yang telah dijual dan diserahkan kepada defendan. Defendan memohon agar tuntutan plaintif dibatalkan di bawah klausa 10(c) perjanjian tersebut yang memperuntukkan dalam *extensors* bahawa: secara ringkasnya, perjanjian tersebut perlu ditafsir menggunakan undang-undang Texas tanpa mengira tempat pelaksanaan; bagi manfaat plaintif, defendan secara muktamad bersetuju bahawa apa-apa tindakan undang-undang perlu dibawa ke Mahkamah Texas; melalui pelaksanaan dan penyampaian perjanjian tersebut, defendan secara muktamad bersetuju dan tertakluk dengan bidang kuasa eksklusif Mahkamah Texas; defendan secara muktamad mengetepikan sebarang bantahan yang ia ada atau mungkin ada dalam penentuan tempat bagi apa-apa tindakan di Mahkamah daerah Texas;

dan bahawa defendan secara muktamadnya mengetepikan sebarang dakwaan bahawa tindakan sedemikian yang dibawa ke Mahkamah telah dibawa ke forum yang tidak sesuai. Defendan menghujahkan bahawa plaintif tidak membuktikan sebarang keadaan 'luar biasa' dalam kes ini yang mewajarkan mahkamah untuk mengatasi niat pihak-pihak yang jelas dinyatakan dalam klausa 10(c). Dicadangkan agar perkara tersebut dibicarakan untuk pertama kali di Mahkamah Texas dan kemudian jika penghakiman berpihak pada plaintif, agar suatu tindakan baru dimulakan di bawah bidang kuasa ini dan mendapatkan penghakiman melalui penghakiman ringkas untuk mengekalkan keputusan Mahkamah Texas. Plaintif menentang permohonan ini sekeras-kerasnya.

Diputuskan, membenarkan tuntutan:

(1) Tafsiran ke atas klausa 10(c) memperuntukkan bahawa undang-undang yang mengawal selia pengadilan pertikaian tersebut haruslah undang-undang Amerika, khususnya undang-undang Texas. Oleh itu, di mana jua tuntutan ini dihakimi, undang-undang terpakai yang mengawal selia adalah undang-undang Texas. Selebihnya, klausa 10(c) memperuntukkan bahawa dalam keadaan dan bagi manfaat plaintif, defendan secara muktamad mengetepikan apa-apa hujahan atau bantahan yang mungkin dibuat berkenaan forum ini atau bidang kuasa Mahkamah Texas yang mana tuntutan plaintif boleh dibawa di Mahkamah tanpa sebarang pertikaian lanjut atau bantahan daripada defendan (lihat perenggan 9(a)(b)).

(2) Bahagian kedua klausa 10(c) dilihat seperti memperuntukkan atau memberi plaintif manfaat memutuskan untuk membawa tuntutan ke Mahkamah Texas yang mana pihak-pihak telah bersetuju bahawa tidak akan ada bantahan daripada defendan. Namun ia tidak boleh diputuskan dengan muktamad bahawa klausa tersebut juga menyatakan bahawa pihak-pihak telah bersetuju secara muktamad untuk menghadkan diri mereka kepada bidang kuasa Mahkamah Texas. Dalam hal keadaan ini, tafsiran yang sesuai diberikan kepada klausa 10(c) adalah untuk menerima hakikat bahawa undang-undang berkaitan yang mengawal selia pertikaian tersebut adalah undang-undang Texas, tetapi bahawa isu forum ini adalah salah satu yang tidak diputuskan secara muktamad (lihat perenggan 9(b)).

(3) Plaintif telah dilepaskan daripada beban menunjukkan keadaan khas yang mewajarkannya untuk membawa tindakan di bawah bidang kuasa ini, tanpa melihat kepada klausa 10(c). Keadaan khas adalah ketiadaan pengiktirafan di bawah REJA dan kesusahan dan kos memulakan suatu tindakan di Texas berdasarkan fakta ringkas dalam tuntutan ini untuk wang yang perlu dibayar dan terhutang bagi pembekalan perisian dan lesen (lihat perenggan 9(c)).]

Notes

For cases on forum conveniens, see 2(1)*Mallal's Digest* (4th Ed, 2012 Reissue) paras 5245–5263.

Cases referred to

Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad [1976] 2 MLJ 154; [1976] 1 LNS 31, FC (refd)

Harrah's Operating Co Inc (trading as Harrah's Casino Hotel Lake Tahoe & Bill's Lake Tahoe Casion) v Wu Yun Shya Josephine and another appeal [2008] 4 MLJ 63; [2008] 5 CLJ 251, CA (refd)

James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd (Tan Koon Swan, third party) [1996] 2 MLJ 97; [1996] 2 CLJ 67, HC (folld)

Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd [1993] 2 MLJ 396; [1993] CLJ 532, HC (folld)

Southern Acids (M) Bhd v Standard Chartered Bank Malaysia Bhd [2012] 2 CLJ 361, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23

Evidence Act 1950 s 45

Mohd Ariep Emran Arifin (Azmimi Pharmy with him) (Wong & Partners) for the plaintiff.

Jason Yeo (Yeap Yong & Amy) for the defendant.

Nallini Pathmanathan J:

DECISION

[1] The plaintiff, a company incorporated in the United States of America, more specifically in Texas entered into a COADE Global Network Partner independent representative agreement dated 1 January 2009 for the supply of software products. It was further agreed that the defendant, a company incorporated in Malaysia, would be appointed as the non-exclusive network partner to market and solicit orders for software products of which the plaintiff was the owner or licensee.

[2] The plaintiff contends that pursuant to the said contract it duly supplied and delivered the software products to the defendant. The plaintiff's claim in this suit is for the sum of USD302,135.08 being the amount due and owing for licence fees for the software products sold and delivered to the defendant.

[3] The defendant seeks to have the plaintiff's claim struck out on the basis of cl 10(c) of the agreement dated 1 January 2009. The said clause which I do

not propose to reproduce here sets out in extensor the following, by way of summary:

(a) that the agreement shall in all respects be interpreted and construed in accordance with the law of the state of Texas regardless of the place of its execution or performance;

(b) for the benefit of the plaintiff, the defendant irrevocably agrees that any legal action shall be brought in the courts of the States of Texas;

(c) by the execution and delivery of this agreement, the defendant irrevocably consents and submits to the exclusive jurisdiction of the Texas courts;

(d) the defendant irrevocably waives any objection it had or may have to the laying of venue for any action in the courts of the State of Texas; and

(e) the defendant irrevocably waives any claim that such an action brought in such a court had been brought in an inconvenient forum.

[4] Given the existence of this clause the defendant contends that the plaintiff is bound irrevocably to bring the action only in the forum designated there, namely the Courts of Texas and to apply the laws of Texas in the adjudication of this claim.

[5] Relying, inter alia, on *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad* [1976] 2 MLJ 154; [1976] 1 LNS 31, *James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd (Tan Koon Swan, third party)* [1996] 2 MLJ 97; [1996] 2 CLJ 67 and *Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd* [1993] 2 MLJ 396; [1993] CLJ 532 the defendant maintains that legal proceedings in respect of the debt claimed by the plaintiff should be initiated solely in Texas as it is exclusively those courts specified in cl 10(c) that possess the jurisdiction to adjudicate on this matter. Further, and this is not in dispute, the defendant maintains that should the defendant wish to invoke the Malaysian jurisdiction then the onus is on the defendant to prove by evidence that the facts and circumstances are so exceptional as to warrant the foreign jurisdiction clause being ignored or overridden:

> The Malaysian court can intervene but will do so and assume jurisdiction only in rare and exceptional cases. Such power will be resorted to with great care and on ample evidence produced that the action abroad is really vexatious and useless. The burden is on the party seeking the court's intervention to prove by evidence that the facts and circumstances are so exceptional and in breach of the foreign arbitration/jurisdiction clause … (see *Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd*.

[6] And also *Southern Acids (M) Bhd v Standard Chartered Bank Malaysia Bhd* [2012] 2 CLJ 361: A

> (2) The parties had submitted to the English jurisdiction and the plaintiff had waived any objection that England was an inconvenient forum. As such the burden was on the plaintiff to show why the trial should proceed in Malaysia and not in B England. However the plaintiff failed to discharge the burden by showing any special or exceptional reasons to justify its commencement of the action in Malaysia in disregard of the non-exclusive jurisdiction clause.

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[7] The defendant further contends that the plaintiff has disclosed or shown no 'exceptional' circumstances in the current case warranting or justifying this court overriding the clear intention of the parties as expressed in cl 10(c). It is proposed that the matter be heard at first instance in the Texas Courts and then if judgment is obtained for the plaintiff to institute a fresh action in this D jurisdiction and obtain judgment by way of summary judgment to uphold the decision of the Texas Courts. This would be necessary it is contended as the Reciprocal Enforcement of Judgments Act ('REJA') does not allow for the recognition of judgments handed down by the courts in Texas. The defendant also contends that if the Malaysian Courts were to adjudicate on this matter, E then given the presence of the Texas law clause regarding the relevant law to be applied, the defendant would be put to the cost of appointing an expert in Texas law to prove its defence. The merits of the case would have to be adjudicated as a matter of fact through expert witnesses on the law under the provisions of s 45 of the Evidence Act 1950. F

[8] The plaintiff strongly opposes this application contending, inter alia, that:

(a) the civil jurisdiction of the High Court as provided in s 23 of the Courts G of Judicature Act 1964 ('CJA') allows the plaintiff's claim to be brought in this jurisdiction as the cause of action arose in this jurisdiction as the agreement between the parties was executed here and the defendants reside here;

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(b) the jurisdiction of the Malaysian courts has not been ousted and cannot be ousted (see *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad*; and

(c) the plaintiff contends that it has satisfied or discharged the onus on it of I showing special circumstances warranting or justifying the commencement of an action in Malaysia because the defendant is ordinarily resident here and because any judgment obtained in the courts in Texas would not be readily enforceable here, (see *Harrah's Operating Co Inc (trading as Harrah's Casino Hotel Lake Tahoe & Bill's Lake Tahoe*

Casion) v Wu Yun Shya Josephine and another appeal [2008] 4 MLJ 63; [2008] 5 CLJ 251 where in a similar situation the Court of Appeal held as follows:

> It must be appreciated that the United States of America is not a signatory of the Reciprocal Enforcement of Judgments Act 1958, and as such a successful judgment there may not be easily enforced in Malaysia. Imagine the monumental problems and sufferings that will befall the appellant if the matter were to go through some fresh legal process all over again in Malaysia merely to enforce that judgment. Apart from being costly it would be plainly illogical and unjust.

[9] I have read and considered the facts pertaining to this matter as well as the comprehensive submissions made by learned counsel for the plaintiff and the defendant. It appears to this court that:

(a) a reading of cl 10(c) stipulates that the law governing the adjudication of the dispute is to be American law, more specifically Texas law. Therefore wherever this the claim is adjudicated upon, the relevant applicable governing law would be that of Texas;

(b) the rest of cl 10(c) provides that in the event and for the benefit of the plaintiff the defendant waives irrevocably any arguments or objections it might take in respect of the forum or jurisdiction of the Texas Courts such that the plaintiff's claim may be brought in such courts without any further dispute or objection from the defendant. Does it follow from this section of cl 10(c) that the plaintiff is precluded from opting to pursue its claims in another jurisdiction such as Malaysia where the courts are possessed of the necessary jurisdiction to adjudicate on the claim? It would appear not, to my mind. This is because the second part of cl 10(c) appears to provide or accord the plaintiff the benefit of deciding to bring its claim in the Texas Courts whereupon the parties have agreed that there would be no objection from the defendant. But I cannot conclude with certainty that the clause also stipulates that the parties have agreed irrevocably to confine themselves to the jurisdiction of the Texas Courts. In these circumstances it appears to me that the correct construction to be accorded to cl 10(c) is to accept that the relevant governing law for this dispute is Texas law, but that the issue of the forum is one that is not conclusively decided. Should the plaintiff have decided to bring proceedings there, then the defendant is precluded contractually from raising any objection. But the clause is silent as to the position should the plaintiff choose to bring an action in the Malaysian jurisdiction. There is certainly no ouster of the Malaysian jurisdiction in cl 10(c). For these reasons I am unable to conclude that the plaintiff has no jurisdiction to bring the action here and that it should be struck out or stayed; and

(c) further and in any event it appears to this court that the plaintiff has

discharged the burden of showing special circumstances warranting the bringing of an action in this jurisdiction, notwithstanding cl 10(c). The special circumstances are the lack of recognition under REJA and the inconvenience and costs of initiating an action in Texas on the relatively straightforward facts of this case for monies due and owing for the supply of software and licenses. As stated in *Harrah's Operating Co Inc (trading as Harrah's Casino Hotel Lake Tahoe & Bill's Lake Tahoe Casion) v Wu Yun Shya Josephine and another appeal* [2008] 4 MLJ 63; [2008] 5 CLJ 251 it would be unjust to compel the plaintiff to commence proceedings in the United States and then recommence proceedings here, particularly when the defendant is ordinarily resident here. I have considered the defendant's contention of the necessity to call expert witnesses from Texas but even with such costs it would still be more expedient and just to have the matter concluded here. It is not even apparent or evident that such expert evidence will be necessary, given the nature of the plaintiff's claim.

[10] In all these circumstances I am satisfied that the plaintiff's claim ought not to be struck out or stayed and I so order.

Claim allowed.

Reported by Afiq Mohamad Noor